Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO.

RENE MARTIN VERDUGO-URQUIDEZ, PETITIONER,

VS.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a Mexican citizen provisionally arrested in Mexico pursuant to the terms of the United States/Mexico Extradition Treaty and surrendered to United States Marshals on narcotics charges may assert the Principle of Specialty contained within the treaty to preclude his prosecution on subsequently filed and different charges, in light of Mexico's diplomatic protest.

2. Whether due process affords a resident alien an opportunity to be heard in a meaningful manner to determine through an evidentiary hearing whether he was "provisionally arrested" within the meaning of United States/Mexico Extradition Treaty.

3. Whether out-of court statements made by an unavailable codefendant identified as the interrogator of Camarena, which statements were made during his custodial interrogation by United States officials in Mexico confirming that the interrogator was present but that Petitioner was not present during the interrogation are sufficiently reliable to

justify their admission under Federal Rule of Evidence 804 or at the least mandated a continuance to obtain the late released information by way of deposition.

4. Whether defense counsel's remarks made following an uninvited, inflammatory, closing argument by the prosecutor highlighting the heroics of the victim, and passionately inciting the jury to ignore evidence may be used to establish a lack of prejudice and place "the comments in context" when the only curative instruction to the jury was that arguments are not evidence.

5. Whether, given the minimal evidence linking Petitioner to the offenses charged, namely his presence at the scene of the crime, the jury should have been instructed that Petitioner's theory of defense instruction that his presence at the scene of the interrogation of Camarena for a purpose other than to participate in the interrogation of Camarena mandated not guilty verdicts.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

NO.

UNITED STATES OF AMERICA, RESPONDENT
VS.
RENE MARTIN VERDUGO-URQUIDEZ, PETITIONER

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENE MARTIN VERDUGO-URQUIDEZ, by and through his attorney Patrick Q. Hall respectfully petitions for a writ of certiorari to review the judgment in the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Petitioner Verdugo's conviction was initially reversed and remanded to the District Court reported at 939 F.2d 1341. Certiorari was granted and this matter was remanded to the Ninth Circuit in light of the opinion in United States v. Alvarez-Machain. ___U.S.___, 112 S.Ct. 2986 (1992) Subsequently the Court of Appeals, by divided vote reversed

in part and affirmed in part. The opinion of the Court of Appeals (App., *infra*, 1a-19a) is unreported. The opinion of the District Court is unreported. Portions of the dialogue and argument at the time of the presentation of the motion are contained at Appendix "C". (App., *infra*, 21a-24a)

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

> due process of law; nor shall private property be taken for public use, without just compensation.

TREATY INVOLVED

The extradition treaty between the United States of America and the United Mexican States, May 4, 1978, 31 U.F.T. 5059, T.I.A.S. No. 9656 is reprinted in an appendix (App., *infra*, 25a-40a).

STATEMENT

1. On August 3, 1985, Drug Enforcement Agents obtained information connecting Petitioner Verdugo to the alleged importation of several tons of marijuana to the United States. These agents obtained a sealed criminal complaint against Petitioner Verdugo in United States District Court for the Southern District of California. The initial complaint charged him with narcotics offenses exclusively. Based upon the complaint, the District Court issued a warrant for Verdugo's arrest. On January 24, 1986, Petitioner Verdugo was stopped by six Mexican police officers while driving his

car in San Felipe, Mexico. There, as has been previously stated by the Solicitor General in his previous briefs (see Petition for Writ of Certiorari, United States Court of Appeals Case No. 88-1353), Petitioner was ordered out of his car, arrested, handcuffed and placed in the back seat of the officers' car. Ultimately, Petitioner was then driven to the Mexican/American border where he was turned over to awaiting United States Marshals. What happened however between the time of the initial issuance of a warrant of arrest and Petitioner's arrest in Mexico by Mexican police officers has never been fully developed.

In its briefs in connection with the related appeal 88-1353, Solicitor General has noted that the DEA asked the United States Marshals Service to determine whether Mexican officials could apprehend Petitioner in Mexico and deliver him to the United States for trial. (See Petition for Writ of Certiorari at page 2). In January of 1986, Mexican law enforcement officers allegedly advised the Marshals

Service that Verdugo could be arrested if there was an outstanding American warrant for his arrest. Reportedly, the United States Marshals Service then showed Mexican authorities a Federal arrest warrant. (See Solicitor General's Petition for Writ of Certiorari). More importantly, it is believed that at an evidentiary hearing, Petitioner could establish that U.S. authorities made inquiries during this time period about the extradition and provisional arrest of Petitioner.

This court has previously ruled upon the validity of the search of Petitioner's residence in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). In that case evidence was developed regarding the search of his home the following day by U.S. officials and mexican Federal Judicial Police. There it was established that high-ranking Department of Justice officials were present in San Diego at the time of the arrest of Verdugo, that the top law enforcement official in Mexico was contacted for permission

to search Verdugo's residence, and that DEA officials in Mexico City assisted in dealing with the Mexican authorities to obtain permission to search the house. The hearing was limited however to the facts relating to the search and Petitioner was not permitted to inquire about the circumstances of his arrest, particularly the efforts of the U.S. authorities to seek the provisional arrest of Petitioner. Similarly, the Central Distct Judge did not permit any hearing regarding the circumstances of Petitioner's arrest.

On April 23, 1986, the Embassy of Mexico presented a Diplomatic Note to the United States Department of State, requesting information about newspaper reports that Petitioner had been abducted in Mexican territory by former Mexican police officers who were hired by United States authorities. The note alleged that if those reports were true, that a violation of Mexican and international law had occurred. On March 16, 1987, the State Department replied that Petitioner's "apprehension . . . was effected pursuant to

the long standing local practice of cooperation between law enforcement agencies of the United States and the Republic of Mexico," and that "the Mexican officials involved were not hired by the United States authorities."

A second Diplomatic Note presented on August 26, 1987 by the Embassy of Mexico to the State Department, asserted that the federal district judge presiding over the narcotics case against Petitioner had found that DEA officials had paid Mexican police officer $32,000 to kidnap Petitioner and bring him to the United States for trial. The Note added that Mexico "cannot recognize as valid a judicial practice that disregards the procedures established by the extradition treaty currently in force between Mexico and the United States." The Note further requested "the kind mediation of the Department of State in informing the corresponding judicial authorities of the position of the Mexican Government."

In the reply of the Department of State dated February 26, 1988, the United States indicated that the

Department of Justice had been requested to send a copy of Mexico's Note and the Department of State's Note to the appropriate judicial authorities. The Note also took issue with Mexico's assertions concerning the circumstances of Verdugo's apprehension. The Note expressly indicated that the United States had not acted unilaterally, but had obtained custody of Petitioner Verdugo in cooperation with Mexican law enforcement officials.

2. On March 16, 1988, a grand jury in the Central District of California returned a five-count Indictment charging Petitioner Verdugo with offenses growing out of the torture and kidnapping of Special Agent Enrique Camarena.[1] Petitioner filed motions to dismiss the Indictment and

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[1] The Indictment charged Petitioner with two counts of committing violent crimes in furtherance of racketeering in violation of 18 U.S.C. 1952(B); one count of conspiracy to kidnap a federal agent and one count of kidnapping a federal agent in violation of 18 U.S.C. 1201(c) and 1201(a)(5) and one count of murder of a federal agent in violation of 18 U.S.C. 1111.

expressly requested an evidentiary hearing regarding the circumstances of Petitioner's apprehension. One of these motions sought to dismiss the first superseding indictment charging these offenses pursuant to the Principle of Specialty contained with Article XVII of the United States/Mexican Extradition Treat, as well as pursuant to the Due Process Clause to the United States Constitution. These motions were denied and trial commenced on July 27, 1988.

As to Petitioner Verdugo, the evidence consisted of the following: On February 7, 1985, at approximately 1:45 p.m., Agent Camarena of the DEA assigned to Guadalajara left the office. On February 7, 1985, at approximately 4:30 p.m., Petitioner Verdugo checked in to the Hyatt Regency Hotel in Guadalajara, Mexico. Several telephone calls were made, and on February 8, 1985, the hotel records reflect that room service was ordered in one of the rooms. On February 9, 1985, the records reflect that Verdugo checked out. Jorge

Gomez Espana testified that on February 7 or February 8, 1985, he went to 881 Lope de Vega, where at approximately 6:00 p.m. to 7:00 p.m., he saw Verdugo with someone identified as a Comandante outside the residence. Verdugo asked him for a ride to the Hyatt Regency. Gomez Espana testified that Verdugo responded "You think you had a problem, don't pay attention to it. I've been trying to get a hold of this guy for a few days to get another problem solved, and I did too."

Subsequent investigation by the FBI recovered a hair which an FBI agent testified was substantially similar to the hair belonging to Verdugo. Further expert testimony placed this hair in the same room as a hair belonging to Enrique Camarena. Fibers and cords subsequently recovered from Camarena's body linked his interrogation to this residence at 881 Lope de Vega.

Another witness testified that between March and

May of 1985, he went on a car ride with Verdugo, Don Walters and himself. At that time, Verdugo and Walters had a conversation primarily in Spanish which the witness did not understand. While in the back seat of the vehicle, the witness testified that he heard Verdugo say, "something about someone being beat to shit and they were begging and crying." Another witness testified that he had been involved in a marijuana smuggling operation for Verdugo and that on one occasion Verdugo discussed Caro Quintero. A helicopter pilot testified that he sold marijuana for Verdugo and had met Rafael Caro-Quintero once or twice at an air strip in Mexico. Verdugo had told him that he was the number two man to Caro-Quintero.

At trial, several copies of a tape were played for the jury. The tape consisted of the alleged interrogation of Enrique Camarena. DEA Agents, having listened to the tapes for a number of hours, identified one of the

interrogators on the tape as Sergio Espino Verdin.

During the trial, the Government produced for the first time reports reflecting that Sergio Espino Verdin had admitted being present at Lope de Vega while in custody and interrogated by Drug Enforcement Agents. In those statements, he indicated that Verdugo was not present during the investigation. Upon learning of the existence of the reports, defense counsel requested introduction of the statements pursuant to Rule 804 of the Federal Rules of Evidence. The trial court denied admission of these statements, refused to continue the trial to allow trial counsel to interview Espino Verdin (who was in custody in a Mexican Jail), or to continue the trial to obtain the deposition of Espino Verdin.

At closing arguments, the prosecutor's first words in closing argument were that "Neither all great Neptune's oceans or any interpretation of the facts could wash the blood

from Verdugo's hands." The prosecutor called Enrique Camarena a hero, whose only fault was that he did his job well, and that he was beaten until "his life slowly drained from his body." During closing arguments, the prosecutor argued that Verdugo was present during the interrogation of Camarena and did nothing but continue to request that the interrogator, Espino Verdin, continue the questioning to find out what else he [Camarena] knew about the Verdugo's operation. The prosecutor called the defense attorneys magicians and asserted that they will "focus your attention someplace else while he is doing the trick with the other hand."

Finally, the prosecutor closed with the statement, "Enrique Camarena, from his grave, cries out for justice. He cries out for justice that the people that have done this to him, that these ungodly acts be brought to justice and he will not rest in peace, he cannot rest in peace, nor can I, until

justice is done." All of these statements occurred before any defense counsel in the trial made any comments whatsoever. Defense immediately made a motion for mistrial based upon these comments which was denied. The only curative instruction given during the trial was that the arguments of counsel are not evidence.

Petitioner's defense at trial was that he was present at Lope de Vega to report to Caro-Quintero about the seizure of marijuana by U.S. authorities on February 5, 1985. Evidence was introduced to the effect that on prior occasions, when marijuana was seized or moldy, that Petitioner had to report this to some representative of Caro-Quintero, on one occasion his brother Miguel. Petitioner requested the following instruction, "Unless convinced beyond a reasonable doubt that Rene Verdugo went to 881 Lope de Vega to participate in the interrogation of Camarena, you must find him not guilty of all charges." The Court refused to give

this instruction.

After a two month jury trial, Petitioner was convicted of all counts in the Indictment. He was sentenced to four consecutive 60 year terms of imprisonment plus life imprisonment.

3. The Court of Appeals initially reversed Petitioner's conviction (939 F.2d 1341). The Court of Appeals concluded that the manner of Verdugo's apprehension violated the United States/Mexico Extradition Treaty and remanded the case specifically to conduct an evidentiary hearing regarding the circumstances of Verdugo's apprehension. The Solicitor General petitioned for a writ of certiorari. Petitioner Verdugo objected to the Petition on the grounds that the issues were not ripe for decision on appeal and that no evidentiary hearing had ever been conducted relating to the circumstances of his apprehension. The Court granted the writ of certiorari, vacated the judgment and

remanded the case to the United States Court of Appeals for further consideration in light of United States v. Alvarez-Machain, ___ U.S. ___ 112 S.Ct. 2986 (1992).

On June 22, 1994, by divided vote, the Court of Appeals affirmed Verdugo's conviction with respect to four out of the five counts. One of the convictions relating to Alfredo Zavala, violation of 18 U.S.C. section 1952, was reversed due to the insufficiency of the evidence. Justice Reinhardt dissented concluding that all of the evidence was insufficient with respect to all of the remaining counts.

The Court of Appeals concluded that Verdugo could not rely on the Doctrine of Specialty "assuming" that he was in fact not extradited pursuant to the treaty. Id at 3a. The Court concluded that even if high ranking Mexican officials were involved in planning Verdugo's apprehension and their insistence on the existence of an arrest warrant pursuant to Article 11 of the United States/Mexico Extradition Treaty,

that Verdugo could not assert the protections of the treaty. The Court concluded that under the Treaty, a formal request by the United States is necessary to initiate extradition proceedings, and therefore, even if provisionally arrested at the request of the United States pursuant to the United States/Mexico Extradition Treaty, Verdugo could not assert the Doctrine of Specialty. Therefore, the court concluded that Verdugo was not entitled to an evidentiary hearing absent allegations of the existence of formal request for extradition by the United States. Id at 4a.

The Ninth Circuit also concluded that the District Court did not abuse its discretion by excluding testimony that Espino Verdin told [Mexican police] that Verdugo was not present at Lope de Vega during the interrogation of Camarena. The actual statements sought to be introduced were that Espino Verdin told DEA Agents present at the Mexican jail that Verdugo was not present at Lope de Vega

during the interrogation of Camarena. The Ninth Circuit concluded that the statement failed to satisfy the requirements based upon its lack of corroborating circumstances indicating that the statement was trustworthy. The Ninth Circuit reasoned that because the statement was not spontaneous and was taken while Espino was in the custody of the Mexican Federal Judicial Police under questioning regarding his role in the kidnapping and torture of Camarena and Zavala, it was not trustworthy. Accordingly, the court concluded that there was no evidence directly corroborating Espino's statement and that the statement was contradicted by other (unidentified) testimony placing Verdugo at Lope de Vega. The Court also noted that the statement was not strongly against Espino's penal interest. Notwithstanding its late delivery midway through the trial, the Court concluded that it was not error to deny a continuance to interview Espino Verdin or seek to obtain the deposition of Espino Verdin.

The Court below also concluded that the inflammatory comments disparaging defense counsel and vouching for the credibility of witnesses were "acceptable advocacy" relying upon its prior opinion in United States v. Lopez Alvarez, 970 F.2d 583 (9th Cir. 1992). In Lopez Alvarez, the court concluded that the propriety of a prosecutor's remarks must be judged in relation to what constitute a fair response to the remarks of defense counsel. Id. at page 597. The court there concluded that most of the comments challenged by Lopez Alvarez were made in response to comments made by defendant's counsel. The court concluded that viewed in the context of defense counsel's comparison of the prosecutor to the Wizard of Oz, that remarks were, although not highly desirable, acceptable advocacy. Id at page 598.

The arguments specifically referenced by Verdugo as objectionable were those made by Assistant United States James Gurule, prior to any closing argument by any defense

counsel in the case, not the comments made during rebuttal by a different attorney assigned to the case.

Finally, the Ninth Circuit concluded that the theory of defense jury instruction was inadequate since there was "sufficient evidence Verdugo was a member of a conspiracy to kidnap, interrogate and murder Camarena". The jury could have convicted Verdugo even if he went to Lope de Vega for reasons other than to interrogate Camarena.

Ciruit Judge Reinhardt dissented from the decision concluding that the evidence was insufficient to support the verdict. He concluded that the only concrete evidence that the Government had provided for the convictions was that Verdugo may have had a motive to participate in the conspiracy, and that on or about the day of the murder, he was present at the large compound where Camarena was held captive. Judge Reinhardt concluded that Verdugo's statement that he had "taken care of a problem" was extremely vague

and of little evidentiary worth "because there was no evidence suggesting that the problem in question was Camarena." The dissent also concluded that the evidence relating to Verdugo's statement as to the beating of a "narc" carried little probative worth since there was no proof that Verdugo was relating an incident that he personally witnessed or doing anything more than referring to what was by then an undoubtedly well-known story. The dissent also concluded that the evidence relating to a hair "substantially like Verdugo's" in a room where Camarena "was most likely tortured and interrogated was insufficient to establish Verdugo's participation in the crimes charged.

A petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 5, 1994, with an amendment of the opinion. On November 5, 1994, Justice O'Connor granted an extension of time to file the instant petition until December 2, 1994

REASONS FOR GRANTING THE PETITION

1. The opinion of the court below makes a drastic departure from preexisting case law relating to the procedures necessary to initiate extradition. The Ninth Circuit opinion concludes under the treaty, "A formal request by the United States is necessary to initiate extradition proceedings." Citing United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980). This conclusion of law is erroneous for a number of reasons, including both the interpretation of the language of the treaty itself and the existing practice with respect to the initiation of extradition proceedings.

The United States/Mexico Treaty, T.I.A.S. No. 9656, specifically contemplates procedures not involving a formal request for extradition. Article XI of the treaty entitled "Provisional Arrest" sets forth that in cases of urgency, either contracting party, meaning the United States or Mexico, may request the provisional arrest of an accused or

convicted person. (App., *infra,* 31a.) The request shall contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, a declaration of the existence of a warrant of arrest issued by competent judicial authority, and most importantly, "an undertaking to formalize the request for extradition." The Ninth Circuit's opinion clearly ignores the express language of the treaty relating to undertakings to formalize the request for extradition. Its conclusion that a formal request is necessary to initiate the extradition process simply ignores this express language of the treaty.

The lower court's interpretation of the treaty also ignores the clear language of Paragraph 2 of Article XI which mandates that the requested party "shall take necessary steps to secure the arrest of the person" claimed. The treaty then sets forth a specific procedure relating to this provisional arrest and contemplates that subsequent to the

provisional arrest, a "formal request for extradition" and the documents mentioned in Article X be received. Paragraph 3, Article X.(App., *infra,* 29a-30a)

Moreover, even if the provisional arrest is terminated, the treaty contemplates that this event should not prejudice a subsequent formal request for extradition delivered at a later date according to Paragraph 4, Article XI. Thus, the arrest of a person by law enforcement authorities in a foreign country at the request of the United States is expressly provided for in the United States/Mexico Extradition Treaty.

The lower court's interpretation also flouts accepted principles of treaty interpretation set forth by this Court. In interpreting an international treaty, Courts should be mindful that it is in the nature of a contract between nations to which general rules of construction apply. Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 533 (1987). In Air France v. Saks, 470 U.S. 392,

397 (1985), this Court held that a court must begin interpretation of the treaty with the text of the treaty and the context in which the written words are used. There, the court said that in construing a treaty, a court has the "responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting party." Air France v. Saks, supra, at page 399.

The clear import of treaty language controls unless application of the treaty according to its obvious meaning effects a result inconsistent with the intent or expectations of its signatories. Sumotomo Shoji American Inc. v. Avagliano, 457 U.S. 176, 180 (1982); Maximov v. United States, 373 U.S. 49, 54 (1963); see also The Amiable Isabella, 6 Wheat 1, 72 (1921).

In Factor v. Laubenheimer, 290 U.S. 276 (1933), this Court stated:

In choosing between conflicting interpretations

> of a treaty obligation, a narrow and restrictive construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements. Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. For that reason if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it, the more liberal construction is to be preferred. Id. at pages 293-294.

Application of these principles of treaty interpretation leads to the inevitable conclusion that the lower court's interpretation of the treaty relating to requiring a formal request by the United States to initiate extradition proceedings is contrary to the intent of the parties, the clear import of the treaty language and the considerations of diplomatic relations and good faith to be associated with the treaty.

Moreover, the lower court's interpretation of the treaty clearly ignores preexisting practice with respect to initiation of extradition proceedings in the United States and abroad. Quite commonly, extradition proceedings are initiated based upon an informal request from the foreign country for the provisional arrest of an individual. See Charlton v. Kelly, 229 U.S. 447 (1913) (extradition proceedings initiated by Italian request for provisional arrest); Grin v. Shine, 187 U.S. 181 (1902) (Imperial Government of Russia requested provisional arrest); Koskotas v. Roche, 931 F.2d 169 (1st Cir. 1991) (extradition proceedings initiated by provisional arrest at the request of Republic of Greece); Caltagirone v. Grant, 629 F.2d 739 (2d Cir. 1980) (holding that probable cause is required for provisional arrest at the request of Italy); United States v. DiTommaso, 817 F.2d 211 (2d Cir. 1987) (defendant arrested pursuant to an international provisional arrest

warrant in Bermuda); United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991) (provisional arrest in Dominica); Matter of Extradition of Russell, 805 F.2d 1215 (5th Cir. 1986) (request for provisional arrest from Colombia initiated proceedings before receipt of formal request); Petition of Geisser, 627 F.2d 745 (5th Cir. 1980) (proceedings initiated by request for provisional arrest followed by Switzerland's later received formal request); In re Assarsson, 635 F.2d 1237 (4th Cir. 1980) (noting that United States/Sweden Extradition Treaty has no requirement that formal charges be filed); Sahagian v. United States, 864 F.2d 509 (7th Cir. 1988) (civil suit initiated following Plaintiff's provision arrest in Spain at request of the Department of Justice official); United States v. Thirion, 813 F.2d 146 (8th Cir. 1987) (defendant provisionally arrested in Monaco before formal extradition request); United States v. Wiebe, 733 F.2d 549 (8th Cir. 1984) (United States Attorney obtained provisional

arrest warrant based upon Interpol telex advising defendant would be changing planes at Minneapolis Airport); Valencia v. Limbs, 655 F.2d 195 (9th Cir. 1981) (United States obtained provisional arrest warrant of petitioner sought by Mexico); Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) (plaintiff was provisionally arrested by German officials based upon receipt of communique from United States with Interpol).

These opinions implicitly recognize that the extradition process may be initiated pursuant to an informal request. The lower court's interpretation of the requirements to initiate extradition proceedings is inconsistent with all other circuits and creates a conflict among the circuits warranting review.

The lower court's ruling also ignores preexisting Supreme Court case law relating to the application of the Principle of Specialty. In United States v. Rauscher, 119

U.S. 407 (1886), this Court held that a person extradited pursuant to the Great Britain/United States Extradition Treaty had standing to object to his prosecution on different charges in the United States, notwithstanding the absence of a provision in the treaty adopting the Principle of Specialty. The Court specifically noted that "The proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he is extradited is met by manifest scope of the treaty itself." Rauscher, at page 42.

In Rauscher, the Court further explained the relevant interpretation of the provisions of the treaty:

> It cannot hardly be supposed that a Government which is under no treaty obligation or any absolute obligation of public duty to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless the case was made of some specific offense of a character which justified the Government into depriving the party of his

> asylum. It is unreasonable that the country of the asylum should be expected to deliver up such a person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. [The foregoing authorities] all show [the treaty] is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited and of bad faith to the country which permitted his extradition. No such view of solemn, public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

United States v. Rauscher, supra, at page 422.

The opinion of this Court in United States v. Alvarez-Machain, ___ U.S. ___ 112 S.Ct. 2188 (1992) does not detract from this conclusion. There, the Court expressly distinguished the opinion of United States v. Rauscher relating to the fact that there was no issue of a forcible

abduction and concluding that Rauscher had been brought to the United States by way of an extradition treaty. Alvarez-Machain simply held that Machain's forcible abduction through the participation of DEA Agents and paid kidnappers in Mexico did not violate the treaty. However, in the instant case, Petitioner Verdugo was not arrested by private citizens working for the Drug Enforcement Administration, but rather by Mexican police officers. The only court to consider any evidence relating to the circumstances of his arrest said that Verdugo was arrested, not simply kidnapped and abducted. This same court concluded that the United States had explored possibilities of extraditing Verdugo and that Mexican officials expressly requested an arrest warrant, one of the requirements set forth in Article XI relating to provisional arrest. Under these circumstantce and in light of the above-cited case law a review of the Ninth Circuit opinion should be granted.

2. Since his apprehension on January 24, 1986, Petitioner has never had an opportunity to set forth in an evidentiary hearing the facts and circumstances relating to his apprehension in Mexico. He was first arrested by law enforcement officers pursuant to a warrant in the Southern District of California. The Honorable J. Lawrence Irving conducted in camera proceedings based upon Verdugo's assertions that his kidnapping violated the Due Process Clause to the United States Constitution. During these proceedings, Petitioner Verdugo's counsel did not raise issues relating to whether his arrest violated the Extradition Treaty. Accordingly, Judge Irving did not address issues raised by the instant motion.[2] Judge Irving expressly made no findings with respect to the Government's actions seeking Verdugo's arrest, or circumstances relating to the

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[2] This hearing was conducted in camera and Verdugo was not permitted through counsel to participate.

negotiations for his arrest. His findings related solely to the manner of the circumstances attendant to Verdugo's arrest in Mexico.

The lower court's conclusion that an evidentiary hearing regarding the circumstances of Petitioner's arrest and particularly a determination whether he was provisionally arrested is simply not necessary, conflicts with preexisting United States Supreme Court authority guaranteeing an individual under the Due Process Clause to the United States Constitution a meaningful opportunity to be heard.

This Court has long held that an essential principle of due process is that a deprivation of liberty be proceeded by notice and an opportunity for hearing appropriate to the nature of the case. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 313 (1950). In a series of decisions beginning with Sniadach v. Famly Fin. Corporation, 395 U.S. 337 (1969), the Court outlined

procedural due process requirements in connection with seizure of property or wages emphasizing the need for pre- or post-seizure hearings. See Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); North Georgia Finishing Inc. v. Dichem, 419 U.S. 601 (1975). Although these opinions deal with due process requirements attendant to the seizure of property or possessions, no less a right to a pre- or post-seizure hearing can be afforded a person contesting the deprivation of his liberty.

The significance of affording Verdugo a hearing relating to the circumstances of his arrest dates back to the marked change in policy and concerns that drove Congress in 1848 to grant judges and magistrates their current role in the extradition process. Between 1794 and 1842 the executive exercised complete control over extradition without reference to the courts. Eian v. Wilkes, 641 F.2d 504, 513

fn.13 (7th Cir.), cert. denied, 454 U.S. 894 (1981) (citing M. Cherif Baffiouni International Extradition and World Public Order, 505 (1974)). Public outcry following a particularly controversial extradition case in the early 1800's prompted the Executive to include language in the next extradition treaty negotiated to provide for judicial involvement. See Jacques Semmelman International Extradition Proceedings at 1207 (discussing Webster-Ashburton Treaty between United States and Great Britain signed in 1842); see also Ruth Wedgewood, The Revolutionary Martyrdom of Johnathan Robbins, 100 Yale L. J. 229, passim (1990).

Thus, in 1852 the Supreme Court recognized that "Extradition without an unbiased hearing before an independent judiciary is highly dangerous to liberty." In re Kaine, 55 U.S. 14 How., 103, 112 (1952). In the instant case, the Ninth Circuit's erroneous interpretation of the

treaty coupled with its failure to grant Verdugo a hearing regarding the circumstances of his arrest clearly violated Petitioner's Due Process rights to an opportunity to be heard in a meaningful manner. Simply filing a motion without any ability to present evidence or establish in an evidentiary hearing the circumstances attendant to his provisional arrest have deprived him of his ability to establish that he was provisionally arrested pursuant to the terms of the treaty and therefore that the Principle of Specialty should apply to preclude his prosecution in the instant charges.

In Florida v. Royer, 460 U.S. 491 (1983), the Supreme Court held that the determination of whether a person was under arrest was dependent upon the totality of the circumstances. Thus, the ultimate determination of whether an individual was arrested or simply detained under the Fourth Amendment rested upon facts developed at an evidentiary hearing. Although the Fourth Amendment is not

being asserted herein, Due Process suggests that the same procedure be utilized to determine the existence of a provisional arrest under the treaty.

3. The lower court's opinion imposes a requirement under Rule 804(b)(3) of the Federal Rules of Evidence that in effect requires conclusive evidence of trustworthiness prior to admission of an out of court statement. The Ninth Circuit's conclusion in essence creates a conflict between circuits regarding whether the statement should be trustworthy or rather whether the declarant should be trustworthy. See United States v. Brainard, 690 F.2d 1117 (4th Cir. 1982). United States v. Lopez, 777 F.2d 543 (10th Cir. 1985).

The court below applied an undefined and indecipherable test to conclude that the statement did not have any corroborating circumstances to clearly indicate the statement was trustworthy. The court then concluded that the

trustworthiness of the statement was undermined by the fact that it was not spontaneous and was taken while Espino was in custody of Mexican Federal Judicial Police under questioning regarding his role in the kidnapping and torture of Camarena and Zavala. To the contrary, the fact that Espino was in custody of Mexican Federal Judicial Police and was responding to questions imposed by Drug Enforcement Administration agents regarding his participation in this conspiracy, and his presence at the interrogation of Camarena, indicate its trustworthiness. The lower court's assertion that there was no evidence directly corroborating Espino's statement completely ignores factors which should be considered in assessing the trustworthiness of a statement. Particularly, the Government introduced tape recordings of the alleged interrogation of Camarena. Government agents identified Espino Verdin as the person conducting the interrogation and asking questions. The

Government's evidence also established, as was argued by prosecutors during closing argument, that Verdugo was present in one room of a very large compound as evidenced by the presence of his hair and the evidence of Camarena's hair. These facts strongly corroborate Espino's statements that he was present at the interrogation. There was no other testimony introduced at trial which contradicted Espino's statements that Verdugo was not present at the interrogation as opposed to his presence at the compound. The only evidence establishing Verdugo was present was his hair and the witness Gomez-Espana who testified that Verdugo was present on the afternoon of February 8, 1985. Gomez-Espana did not testify that he saw Espino there.

Espino's statement that Verdugo was not present at the interrogation directly inculpated Espino as being present at the interrogation. The statement was particularly critical to the defense and prejudiced Petitioner by its exclusion in

light of the Government's argument that Verdugo must have been present during the interrogation [by Espino Verdin of Camarena] when the tape recording was stopped after Camarena first mentioned the name Verdugo. The statement was critical to contradict this argument presented by the prosecutor and inferences to be drawn solely from the presence of Verdugo's name on the tape recording.

Thus, the Ninth Circuit's interpretation of corroborating circumstances seriously undermines interpretation of the Federal Rules of Evidence by other circuits and highlights the need for consistent and definitive guidelines to determine the trustworthiness of statements.

At a minimum, given the circumstances, the late disclosure of the Espino Verdin reports, the refusal to grant a continuance for the interview of Espino Verdin or to take the deposition of Espino Verdin who was in custody in Mexico, all deprived Petitioner of his right to a

fundamentally fair trial and mandate reversal of his conviction.

4. Until this decision by the Court of Appeals, the Doctrine of "Invited Response" recognized that in United States v. Young, 470 U.S. 1 (1985), had only been applied to place in context a prosecutor's rebuttal arguments made in response to the closing arguments made by defense counsel. For several reasons, the lower court's decision applying this principle is wrong and warrants review.

First, the Ninth Circuit improperly expands the "invited response" doctrine espoused in United States v. Young, 470 U.S. 1 (1984) to include situations in which the prosecutor's non-rebuttal remarks which are inflammatory and invite the jury to ignore the evidence presented and the reasonable inferences to be reached therefrom. The lower court's ruling permits justification of such improper remarks based upon the tenor of the subsequent response by defense

counsel.

The lower court's decision incorrectly noted in Lopex-Alvarez, that most of the comments were made in response to comments made by defendant's counsel. This conclusion is factually inaccurate with respect to Petitioner. The comments objected to and set forth in the statement were all made by Assistant United States Attorney James Gurule who made the closing argument by the prosecution. Assistant United States Attorney Raul Campos made the rebuttal argument. After the comments that Enrique Camarena cried out from the grave for justice and that no interpretation of the evidence would wash the blood from Rene Verdugo's hands, defense counsel moved for a mistrial. The only curative instruction given by the Court was that the arguments of counsel were not evidence. In light of the Court's refusal to issue a more definitive curative instruction, defense counsel was faced with responding in kind to the

remarks of the prosecutor or totally ignoring them. When defense counsel then challenged these remarks with arguments of their own, these comments should not be characterized as an "invited response".

The lower court ruling then permits these comments to be considered in context to determine whether Petitioner has been deprived of a fair trial. This type of analysis degenerates into a balancing test of which side made the most improper closing arguments and does not comport with this Court's prior rulings. Nearly a half of a century ago, this Court counseled prosecutors to refrain from improper methods calculated to produce a wrongful conviction. Berger v. United States, 295 U.S. 78 (1935). Similarly, this Court has concluded that prosecutorial remarks in closing argument may be sufficiently prejudicial to deprive the defendant of his constitutional right to a fair trial. Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974).

The opinion below ignores preexisting Supreme Court precedent noting the impropriety of prosecutor's remarks relating to the victim's impact characteristics. See Booth v. Maryland, 482 U.S. 1496 (1987)(where the Court held that statements of victim impact violated the principle that a sentence of death must be related to the moral culpability of the defendant and were "wholly unrelated to the blameworthiness of a particular defendant."); South Carolina v. Gathers, 490 U.S. 805 (1989)(concluding that prosecutor's reference to victim's religious background was improper mandating reversal of the penalty phase.)

These opinions both clearly indicate that a victim's impact is totally irrelevant to the determination of defendant's culpability and the imposition of the death penalty. Such remarks are even more irrelevant to the determination of guilt or innocence as argued in Petitioner's case.

The lower court's determination also invites

prosecutors to commence closing argument with outrageous inflammatory statements and then justify these outrageous and inflammatory statements based upon the anticipated response in kind by defense counsel. Defense counsel is then faced with the strategy of effective advocacy by responding to vicious and foul blows by the prosecution or ignoring them in the hopes that defendant's conviction might be reversed on appeal. This clearly places a chilling effect upon the possible effective representation by trial counsel and involves a balancing/waiver of constitutional rights by a defendant invoking the right to effective assistance in closing argument, and Fifth Amendment right to a fundamentally fair trial. The Ninth Circuit's opinion improperly emphasizes defense counsel's response to determine whether a prosecutor's action has violated defendant's due process right to a fair trial.

Finally, the Ninth Circuit's opinion unduly minimizes

the significance of the prosecutor's uninvited remarks and the context of the evidence as it related to the particular defendants in the case. Unlike codefendant Lopez-Alvarez, who had confessed to his involvement in the conspiracy, who was identified by DEA Agents as participating in the conspiracy at the Guadalajara Airport, and was on tape conspiring to murder yet another federal agent, the evidence against Verdugo was at most minimal, and as one Ninth Circuit Justice concluded, insufficient to convict him of the offenses. The Ninth Circuit opinion completely and improperly encourages courts to ignore the sufficiency of the evidence and the relative strength of the evidence and rely instead on co-defendant's counsel's remarks in the context of closing argument to justify totally improper and inflammatory remarks irrelevant to the determination of guilt or innocence and inciting the jury to rely on its passion and prejudice. Therefore, certiorari should be granted based upon the

improper application of the contextual review of the prosecutor's closing remarks.

5. A number of circuits have held that a defendant is entitled to a charge to the jury which precisely and specifically, rather than merely generally or abstractly points to the theory of his defense. United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976); United States v. Pedroza, 750 F.2d 187 (2d Cir. 1984); United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979); United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988); United States v. Scott, 789 F.2d 795, 797 (9th Cir. 1986).

The court below concluded that since there was sufficient evidence Verdugo was a member of the conspiracy to kidnap, interrogate and murder Camarena, the jury could have convicted Verdugo even if he went to Lope de Vega for reasons other than to interrogate Camarena. The only evidence to which the Court of Appeals conceivably refers

was Verdugo's presence at Lope de Vega and his involvement with Rafael Caro-Quintero in conjunction with marijuana smuggling operations. Simply put, the Ninth Circuit expands the Pinkerton theory of culpability from a conspiracy to import marijuana into the United States, and subjects a member of the conspiracy to any acts done by any member of the conspiracy, no matter how unforeseeable or unrelated. Caro-Quintero's and others' efforts to kidnap, interrogate and murder Camarena, a Drug Enforcement Administration agent stationed in Guadalajara, are not reasonably foreseeable within the scope of a conspiracy to import marijuana into the United States. The Ninth Circuit's cursory analysis of the facts relating to Verdugo's participation in the kidnapping stems from the illogical conclusion that Verdugo is responsible as a member of a conspiracy to import marijuana for the actions of Caro Quintero in kidnapping and interrogating Camarena. There

was no evidence presented to establish anything other than Verdugo's mere presence at the scene of Lope de Vega on the date the Government believed that Camarena was interrogated. The fact that Camarena mentioned Verdugo's name on the interrogation tapes does not establish that Verdugo was present or was even involved in the conspiracy to kidnap Camarena. Similarly, the statements, made months after the incident had been well publicized, to the effect that there was a "narc" and did not even identify Camarena or purport to be of personal knowledge did not establish participation in a conspiracy to kidnap. Verdugo's statement en route from Lope de Vega that he had taken care of a "problem" did not establish that Verdugo was there in fact to take care of Camarena.

The failure to provide the theory of defense instruction was particularly highlighted by the nature of the defense Verdugo raised at the trial, namely that his presence

at Lope de Vega on the date in question was to explain the seizure of marijuana in the United States two days preceding. The court below completely ignored the statement made contemporaneously to the effect that he had been trying to get a hold of Caro-Quintero for several days. The statement was made on February 8, 1985, the day after Camarena had been kidnapped and three days after marijuana had been seized in Arizona.

The lower court's conclusion that the instruction is wrong is erroneous as a matter of law and undermines existing circuit case law which establishes that a theory of defense instruction should be given. Similarly the opinion implies that mere presence at the scene of a crime is sufficient. Certiorari should be granted because this Court has never expressly addressed the issue of whether a theory of defense instruction should be given as opposed to a charge which generally or abstractly points to the theory of defense.

Similarly, certiorari should be granted to address the Ninth Circuit's erroneous conclusion that involvement in a marijuana conspiracy is sufficient evidence to link Verdugo to a more specific conspiracy to kidnap, interrogate and murder Camarena.

CONCLUSION

Based upon the analysis herein and for the above-cited reasons, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

GOLDBERG & HALL

Dated:

PATRICK Q. HALL
Attorney for Petitioner
RENE M. VERDUGO-URQUIDEZ

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 88-5462
	)	
v.	)	D.C. No. CV-87-422(A) -ER
	)	
RENE MARTIN VERDUGO-URQUIDEZ,	)	
	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	
	)	

On Remand from the United States Supreme Court

Argued and Submitted August 11, 1993
San Francisco, California
filed June 22, 1994

Before: BROWNING, D.W. NELSON, and REINHARDT, Circuit Judges

In United States v. Alvarez-Machain, the Supreme Court reversed the decision of another Ninth Circuit panel

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

which relied exclusively on our prior decision in the present case. 112 S. Ct. 2188, 2190-91 (1992), rev'g 946 F.2d 1466 (9th Cir. 1991). The Court thus disapproved our earlier decision and, accordingly, vacated that decision and remanded "for further consideration in light of United States v. Alvarez-Machain." United States v. Verdugo-Urquidez, 112 S. Ct. 2986 (1992), vacating 939 F.2d 1341 (9th Cir. 1991).

Verdugo's appeal originally presented numerous issues; we found it necessary to address only his jurisdictional challenge based on a purported violation of the extradition treaty between Mexico and the United States by the abduction and removal of Verdugo from Mexico to bring him to trial in this case. 939 F.2d at 1344. Because the Supreme Court rejected our initial decision, we must now consider the other issues originally presented by Verdugo.[1]

The parties are familiar with the facts and issues; we restate them only as necessary. We affirm in part and reverse in part.

I. ABDUCTION ISSUES

Verdugo raises three issues relating to his abduction and removal to the United States in addition to the issue

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[1] We consider Verdugo's second and third supplemental briefs filed after remand only to the extent they deal with issues originally presented in his opening brief. (The issues dealt with in Verdugo's first supplemental brief were decided by the Supreme Court in Alvarez-Machain.) We do not consider Verdugo's arguments to the extent they relate to matters not in the record. See Order of March 31, 1993 (striking third supplemental excerpt of record).

resolved by the Supreme Court in Alvarez-Machain. He asserts a violation of customary international law independent of the purported breach of the extradition treaty, violation of the Due Process Clause and violation of the doctrine of specialty.

Outrageous government conduct is a prerequisite to Verdugo's international law and due process claims. See United States v. Alvarez-Machain, 971 F.2d 310, 311 (9th Cir. 1992). The government's conduct in obtaining custody of Verdugo was not shocking and outrageous. See United States v. Verdugo-Urquidez, 856 F.2d 1214, 1216 (9th Cir. 1988) (reciting facts of Verdugo's abduction by Mexican authorities), rev'd on other grounds, 494 U.S. 259 (1990).[2]

Verdugo claims his prosecution violated the doctrine of specialty because he was not extradited on the charges underlying his convictions. We have assumed Verdugo was not delivered to the United States pursuant to the terms of the extradition treaty with Mexico. See 939 F.2d at 1343; see also Alvarez-Machain, 946 F.2d at 1466. If this assumption is correct, Verdugo cannot rely on the doctrine of specialty because that doctrine is

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[2] Although Verdugo seeks an expanded evidentiary hearing regarding facts surrounding his abduction and removal from Mexico, the district court has already conducted a limited proceeding and made findings upon which we relied in our 1988 decision. See Verdugo-Urquidez, 856 F.2d at 1216. Among the district court's findings was that "[a]t no time was Verdugo beaten, tortured, physically struck or verbally threatened or tormented" during his transfer to the United States. United States v. Verdugo, No. 86-0107-JLI-Crim., slip op. at 8 (S.D. Cal. Apr. 11, 1986).

relevant only to extradition. Cf. United States v. Najohn, 785 F.2d 1420, 1422 (9th Cir. 1986) (specialty is concerned with obligations undertaken by the petitioning country to obtain extradition).

In an effort to establish he was in fact extradited and therefore could invoke the speciality doctrine, Verdugo sought an evidentiary hearing to show high-ranking Mexican officials were involved in planning his removal to the United States and asked for copies of the American warrants issued for his arrest. Even assuming Verdugo's allegations are true, more would be necessary to show the United States invoked the extradition treaty with Mexico to obtain custody of Verdugo. Under the treaty, a formal request by the United States is necessary to initiate extradition proceedings. No such request is alleged. See United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980), and cases there cited.[3]

II. SUFFICIENCY OF INDICTMENT

Verdugo challenges the sufficiency of count five of the second superseding indictment, charging felony murder. We rejected the same challenge in the appeal of Verdugo's co-defendant, Lopez-Alvarez. See 970 F.2d at 596-97. That decision controls here.

III. SUFFICIENCY OF EVIDENCE

Verdugo was convicted of the following crimes:

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[3] Verdugo disputes extraterritorial application of the statutes underlying his convictions. We rejected the same arguments in the appeals of Verdugo's co-defendants. United States v. Lopez-Alvarez, 970 F.2d 583, 596 (9th Cir. 1992); United States v. Felix-Gutierrez, 940 F.2d 1200, 1203-06 (9th Cir. 1991).

conspiracy to kidnap a federal agent, in violation of 18 U.S.C. § 1201 (c); kidnapping a federal agent, in violation of 18 U.S.C. § 1201 (a) (5); felony-murder of a federal agent, in violation of 18 U.S.C. §§ 1111, 1114; and two counts of committing violent crimes in aid of racketeering activity, in violation of former 18 U.S.C. § 1952B, now codified at 18 U.S.C. § 1959.

In Lopez-Alvarez's appeal, we upheld the jury's finding that the conspiracy to kidnap Camarena existed in fact. 970 F.2d at 593 (sufficient evidence supported conviction of Verdugo's co-defendant of conspiracy to kidnap Camarena). We need only determine if the government presented sufficient evidence to link Verdugo to this conspiracy. See, e.g., United States v. Bautista-Avila, 6 F.3d 1360, 1362 (9th Cir. 1993). Only a slight connection is necessary, but it must be proved beyond a reasonable doubt. Id.

The prosecution presented evidence that Verdugo was a high-level member of the Caro-Quintero drug enterprise. Verdugo arranged for large quantities of marijuana provided by Caro to be imported to Arizona from Mexico in a helicopter owned by Caro and purchased with money delivered by Verdugo. On February 5, two days before Camarena was kidnapped, police seized two tons of marijuana and the helicopter from a marijuana operation at Casa Grande, Arizona that was under Verdugo's supervision. Leaders of the Caro-Quintero drug enterprise attributed large losses of marijuana to Agent Camarena.

Two days later, on February 7, Verdugo registered at the Guadalajara Hyatt Regency. On the same day, Camarena was kidnapped in Guadalajara and taken to Caro-Quintero's Lope de Vega compound in Guadalajara where he was held captive and interrogated. Gomez-Espana testified that Verdugo was at Lope de Vega at the

time Camarena was there. The witness also testified that he had given Verdugo a ride from Caro's compound to the Hyatt hotel and observed that Verdugo looked tired. During the ride, Verdugo remarked he had "taken care of a problem" and, addressing his fellow passenger, added, "Didn't we, Commandante?"

A forensics team found hair substantially like Verdugo's in the one-room house at Lope de Vega where Camarena was most likely tortured and interrogated. This building was small, dark, and dirty, and resembled a prison, making it unlikely Verdugo would enter it for innocent reasons. When Camarena mentioned Verdugo's name during the agent's torture and interrogation, there was a lengthy pause in the interrogation followed by further questioning about Verdugo by a new interrogator. A month or two after the abduction and murder of Camarena, Verdugo was overheard referring to a "narc" and "someone being beat to shit, and they were begging and crying." Based on this evidence a rational juror applying the reasonable doubt standard could find Verdugo guilty as a principal or an aider and abettor of conspiracy to kidnap, kidnapping, murder, and committing a violent felony against Camarena in aid of racketeering activities.

Verdugo is also vicariously liable for the crimes of his co-conspirators committed pursuant to and in furtherance of the conspiracy. E.g., United States v. Inafuku, 938 F.2d 972, 974 (9th Cir. 1991). Sufficient evidence was adduced at the joint trial of Verdugo and Lopez-Alvarez to sustain Lopez-Alvarez's convictions for kidnapping, murder, and committing a violent crime against Camarena in aid of racketeering activity. Lopez-Alvarez, 970 F.2d at 593. Because Verdugo was a co-conspirator of Lopez-Alvarez, Lopez-Alvarez's convictions on these charges provide an independent basis for affirming Verdugo's convictions for the same offenses.

The remaining conviction is for commission of a violent crime against Zavala in aid of racketeering activity. We reversed Lopez-Alvarez's conviction on this count for lack of direct evidence that Lopez-Alvarez committed a crime against Zavala. 970 F.2d at 593-94. The case against Verdugo is similarly deficient. The transcripts of Camarena's interrogation contain nothing suggesting Verdugo's involvement in violent acts against Zavala. Furthermore, Verdugo's self-incriminating statements refer to only a single violent episode. And while there may have been reason for Verdugo to attack Zavala, the motive is by no means as clear regarding Zavala as it is regarding Camarena. As in Lopez-Alvarez, "the only evidence supporting [Verdugo's] conviction for violent crimes against Zavala is that linking Zavala to the Camarena affair." Id. at 593. Accordingly, we reverse Verdugo's conviction under former section 1952B for committing a violent act against Zavala in aid of racketeering activity.[4]

IV. EVIDENTIARY RULINGS

The district court did not abuse its discretion by excluding testimony that Espino-Verdin told Mexican police that Verdugo was not present at Lope de Vega during the interrogation of Camarena. The statement failed to meet at least one of the requirements for admitting an exculpatory hearsay statement under the exception for statements against penal interest -- corroborating circumstances do not clearly indicate the statement was trustworthy. See United States v. Nazemian, 948 F.2d 522, 530 (9th Cir. 1991).

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[4] Because Lopez-Alvarez was not convicted on this count, we cannot hold Verdugo vicariously liable for the kidnapping and murder of Zavala in aid of racketeering.

In assessing the trustworthiness of hearsay, we consider the time at which the declaration was made, the party to whom it was made, the existence of corroborating evidence, the extent to which the declaration is against the declarant's interest, and the availability of the declarant as a witness. Id. at 531. The trustworthiness of the hearsay statement is weakened by the fact that it was not spontaneous and was taken while Espino was in the custody of the Mexican Federal Judicial Police under questioning regarding his role in the kidnapping and torture of Camarena and Zavala. See, e.g., United States v. Ospina, 739 F.2d 448, 452 (9th Cir. 1984); United States v. Oropeza, 564 F.2d 316, 325 (9th Cir. 1977). There was no evidence directly corroborating Espino's statement, and the statement was contradicted by other testimony placing Verdugo at Lope de Vega. The statement is not strongly against Espino's penal interest -- it added little to other evidence against Espino. Although Espino was not available to testify, that circumstance alone is not enough to render exclusion of the hearsay statement an abuse of discretion.

We have reviewed the numerous other evidentiary rulings to which Verdugo objected during the lengthy trial. The government's arguments in support of these rulings are persuasive (see Appellee's Consolidated Brief at 44-58) and we find no reversible error.

V. CONTINUANCE

Considering the relevant factors, we conclude the district court did not abuse its discretion in denying Verdugo's request for a continuance to interview Espino. See United States v. Flynt, 756 F.2d 1352, 1359 (9th Cir.), amended, 764 F.2d 675 (9th Cir. 1985). The request was tardy and, as discussed above, the hearsay relating to Espino's statement was not reliable. The

likelihood Verdugo could interview Espino was not great (there was nothing to indicate either Mexican prison authorities or Espino would cooperate and some indication Espino would not); Espino was awaiting trial and had little incentive to implicate himself to exculpate Verdugo; the delay would have been substantial, and would have inconvenienced government witnesses and the court. Espino had been identified as Camarena's main interrogator, and in choosing between conflicting testimony regarding Verdugo's presence at Lope de Vega, the jury would probably believe Gomez-Espana, a relatively uninvolved witness who placed Verdugo at Lope de Vega, rather than Espino, who reportedly said Verdugo was not there. Nor did the trial court abuse its discretion in denying motions for continuances to review Jencks Act materials. Verdugo was provided these materials forty-eight hours prior to the witnesses' testimony. He fails to state how he was prejudiced by this limitation, except to refer to delay in the discovery of the Espino hearsay which we consider immaterial.

VI. BRADY VIOLATIONS

Verdugo contends the government withheld or belatedly produced the following evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) : an additional transcript of Camarena's interrogation; tape recordings of Caro-Quintero's interrogation by MFJP officers; DEA reports of interviews concerning Espino's interrogation; government reports that might have shown that Verdugo was not the number two man in Caro's enterprise; and reports showing that Felix-Gallardo rather than Caro-Quintero was responsible for Camarena's abduction.

To prove a Brady violation, the defense must show a failure to disclose "material" evidence which would have created a reasonable probability that the result of trial

would have been different. E.g., United States v. Brumel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1992). To avoid a Brady violation, the government need only disclose the evidence when it would still be of value to the defendant at trial. United States v. Gordon, 844 F.2d 1397, 1403 (9th Cir. 1988). Much of the evidence to which Verdugo refers was disclosed during trial when Verdugo could still use it. There is no reasonable probability earlier disclosure would have changed the result.

Withholding a third copy of the transcript of Camarena's interrogation was harmless. The defense had access to other recordings of the interrogation and Verdugo provides no basis for his assertion that the third copy "would show that it was not the Rafael Caro Quintero narcotics organization which was responsible for the kidnapping, but rather a Guadalajara narcotics cartel." Appellant's Third Supplemental Reply Brief at 7.

Verdugo was advised about tapes of Caro-Quintero's interview in early May 1988 but failed to request them until August. The district court allowed Verdugo to recall Agent Castillo for cross-examination. In any event, Verdugo does not indicate how the tapes would exculpate him.

The government disclosed the reports of Espino's interrogation approximately two weeks into the two-month long trial. The trial court offered to recall any government witness to neutralize the possibility of prejudice from the delay. Moreover, as previously noted, Espino's hearsay was contradicted by the testimony of one of Camarena's main interrogators, and it is improbable the jury would have believed Espino.

The government was not required to prove Verdugo's exact position in the Caro-Quintero hierarchy. Although the government relied upon evidence that Verdugo was a leader in the Caro-Quintero drug operation

as a circumstance lending support to an inference of knowledge of various facts, his leadership role is not denied and the inference did not depend upon the precise place in the hierarchy Verdugo occupied. Reports indicating Verdugo was not the number two man would not have exculpated him or affected the result of the trial. Similarly, reports that Felix-Gallardo was also involved in the kidnapping would not have exculpated Verdugo. See Lopez-Alvarez, 970 F.2d at 598 (rejecting similar Brady claim by Verdugo's co-defendant).

Verdugo's request for access to presentence reports was properly denied. See United States v. Chavez-Vernaza, 844 F.2d 1368, 1375 (9th Cir. 1987) ("the defendant is not entitled under Brady to inspect [the presentence reports] himself").

VII. PROSECUTORIAL MISCONDUCT

Verdugo accuses the prosecution of inflammatory comments, disparaging defense counsel, and vouching for the credibility of witnesses. We rejected the same contentions in the appeal by Verdugo's co-defendant. See Lopez-Alvarez, 970 F.2d at 597-98. There is no reason to reach a different result here. Verdugo contends the prosecution argued matters outside the record on a number of occasions. In each instance the government's argument was based on fair inferences from the evidence. Moreover, the trial court instructed the jury the statements of counsel were not evidence. See id. at 598.

III. SEVERANCE

The charges against Verdugo were not misjoined with charges against his co-defendants, Felix-Gutierrez and Lopez-Alvarez. Felix-Gutierrez, 940 F.2d at 1208-09; see also United States v. Vasquez-Velasco, 15 F.3d 833, 843-44 (9th Cir. 1994). We have already upheld joinder of the

charges of Verdugo's less culpable co-defendant, Felix-Gutierrez. See Felix-Gutierrez, 940 F.2d at 1209-10; see also Vasquez-Velasco, 15 F.3d at 845-47.

IX. JURY INSTRUCTIONS

A. Theory of the Defense

The district court properly rejected Verdugo's request that the jury be instructed:

> [u]nless you have been convinced beyond a reasonable doubt that Rene Verdugo went to 881 Lope de Vega to participate in the interrogation of Enrique Camarena, you must find him not guilty of all charges in the indictment.

Since there was sufficient evidence Verdugo was a member of the conspiracy to kidnap, interrogate, and murder Camarena, the jury could have convicted Verdugo even if he went to Lope de Vega for reasons other than to interrogate Camarena.

B. Aiding and Abetting

Verdugo claims it was plain error for the trial court not to read to the jury the last paragraph of Devitt & Blackmar instruction 12.03 (3d ed. 1977), stating the jury must find the underlying crime was committed to convict on an aiding and abetting theory. The district court read excerpts of the aiding and abetting statute, 18 U.S.C. § 2, and a modified version of Devitt &Blackmar instruction 12.02, which stated:

> Every person who thus willfully participates in the commission of an offense may be found to be guilty of that offense. Participation is willful if done voluntarily

> and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with a purpose either to disobey or to disregard the law.

This instruction fairly implied the crime must have been committed by someone else and was therefore sufficient to withstand a plain error challenge. See United States v. Armstrong, 909 F.2d 1238, 1243-44 (9th Cir. 1990). Furthermore, any deficiency in the instructions with respect to aiding and abetting would not have affected Verdugo's substantial rights -- the jury could properly convict Verdugo for participation in the conspiracy without reference to aiding and abetting.

C. Eyewitness Identification

Calderon testified that sometime in 1982 he witnessed a meeting in a National City restaurant between Verdugo, Felix, and others, and that subsequently there was an increase in the marijuana supply at the Fowlie ranch. Verdugo asked that the jury be instructed in accordance with Devitt & Blackmar instruction 15.19 (3d ed. 1977) regarding the reliability of identification testimony.

Rejection of the Devitt & Blackmar instruction was not error. The instruction relates to eyewitnesses to a crime and could have confused the jury. Verdugo does not explain why the instructions actually given did not address his concerns. See also Felix-Gutierrez, 940 F.2d at 1211 ("the district court gave extensive and accurate instructions regarding the credibility of witnesses").

* * *

We have reviewed Verdugo's other contentions and find them without merit. The judgment of the district court is affirmed in all respects except that one of Verdugo's two convictions under former section 1952B, now 18 U.S.C. § 1959, is reversed.

AFFIRMED IN PART and REVERSED IN PART.

U.S. v. Verdugo-Urquidez
No. 88-5462
filed June 22, 1994

REINHARDT, J., dissenting:

The trial in this case followed the infamous international kidnappings of two Mexican citizens, Dr. Humberto Alvarez-Machain and the defendant, Rene Martin Verdugo-Urquidez, by United States government agents. They were kidnapped because the Drug Enforcement Agency suspected the two men of participating in the brutal murder of DEA Agent Enrique Camarena-Salazar in Guadalajara. Several years after the kidnappings, United States District Court Judge Edward Rafeedie dismissed all charges against Dr. Alvarez-Machain due to insufficiency of the evidence. In my opinion, the evidence against Verdugo is no more inculpatory. Thus, it would seem, ironically, that in both cases the government ultimately lacked the evidence necessary to prove that the men it kidnapped were guilty. [1]

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[1]/ Two other individuals involved in these events were arrested within the United States and subsequently tried and convicted. In United States v. Felix-Guitierrez, 940 F.2d 1200 (9th Cir. 1991), cert. denied, 113 S.Ct. 504 (1992), we affirmed the conviction of Jesus Felix-Guitierrez for being an accessory after the fact in the conspiracy to kidnap and murder Camarena. In United States v. Lopez-Alvarez, 970 F.2d 583 (9th Cir.), cert. denied, 113 S.Ct. 504 (1992), we affirmed the conviction of Lopez-Alvarez for violent crimes in aid of racketeering for the kidnapping and murder of Camarena, conspiring to kidnap a federal agent, kidnapping a federal agent, and

Regrettably, the majority is unwilling to reverse Verdugo's conviction. Before explaining why a review of the record demonstrates that the evidence is wholly insufficient to support the verdicts, I am compelled to comment on the majority's equally unfortunate decision to treat this important case in an unpublished memorandum disposition. In my view, we clearly violate our rules by doing so. [2] Regardless of whether we are violating our rules, however, our failure to write and publish an opinion here is significant for what it reveals about the current state of our judicial system. My colleagues in the majority are able, dedicated, and hard-working. The truth is, however, that due to our overwhelming caseload we, as a judiciary, simply lack the time to write opinions in cases in which they are warranted. As a result, more and more of our dispositions are issued in unpublished form. The quality of these dispositions, and sometimes the quality of the justice dispensed in them, leaves much to be desired.[3]

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felony-murder of a federal agent.

[2]/ Ninth Cir. R. 36-2 provides for the publication of dispositions of public importance as well as dispositions after a remand by the Supreme Court. The rule applies to dispositions that "[i]nvolve[] a legal or factual issue of unique interest or substantial public importance" or that are issued "following a reversal or remand by the United States Supreme Court." This case clearly meets both these criteria.

[3]The majority gives short shrift to some of Verdugo's claims. The majority concludes its disposition without addressing many of the 21 issues Verdugo raised on appeal simply by noting, "[w]e have reviewed Verdugo's other

Even in the case at hand, **? Although none of this is news to any of us, federal judges are unwilling to acknowledge the need to increase our numbers significantly. Too many of us simply like the status quo. See Stephen R. Reinhardt, Too Few Judges, Too Many Cases: A Plea To Save the Federal Courts, A.B.A. J., Jan. 1993, at 52. As a result, we are, more and more frequently, burying important cases like the one before us in unpublished memorandum dispositions.

Turning to the case at hand, I dissent from the majority's holding in Part III that there is sufficient evidence to support the convictions of Verdugo for conspiring to kidnap a federal agent, kidnapping a federal agent, felony-murder of a federal agent, and committing violent crimes in aid of racketeering activity.

The only concrete evidence that the government has provided for the convictions is that Verdugo may have had a motive to participate in the conspiracy and that on or about the day of the murder he was present at the large compound where Camarena was held captive. These facts are insufficient to permit a reasonable juror to conclude beyond a reasonable doubt that Verdugo participated in the conspiracy to murder Camarena or committed any of the other offenses of which he was convicted.

In addition, the government relies on two other categories of evidence to support the conviction. In each case, however, the specific evidence is of little or no probative value. First, the government urges that some extremely vague comments made by Verdugo buttress its

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contentions and find them without merit." Similarly, it dismisses the "numerous other evidentiary rulings to which Verdugo objected" merely by citing the government's brief.

case. It argues that Verdugo's statement that he had "taken care of a problem" represents proof that he participated in the murder of Camarena. The comment is of little evidentiary worth because there is no evidence suggesting that the "problem" in question was Camarena. In fact, the comment is not of much more relevance than the observation, also relied upon by the government, that Verdugo "looked tired." There are clearly a large number of possible explanations for Verdugo's fatigue, and the testimony contributes absolutely nothing to the government's effort to prove beyond a reasonable doubt that Verdugo was guilty of the crimes with which he was charged. Similarly, the government's evidence concerning Verdugo's reference, months after the incident, to the beating of a "narc" is of little probative worth. The government offers no proof that Verdugo was relating an incident that he personally witnessed or doing anything more than referring to what was by then undoubtedly a well-known story, at least in the circles in which Verdugo seems to have operated.

The second category of evidence is physical evidence. In truth, the government's entire case with respect to all of the counts hangs by a single hair. The prosecution tried to place Verdugo at the actual scene of the crime by introducing evidence that a hair "substantially like Verdugo's" was in the room where Camarena "was most likely tortured and interrogated" (emphasis added). Surely the government's discovery of a hair that resembles Verdugo's in a room where the government thinks the crime took place cannot satisfy the rigorous standards of proof that our system of justice imposes upon the prosecution.

In my opinion, no reasonable juror could find that the government's evidence proves beyond a reasonable doubt that Verdugo participated in the crimes with which

he is charged. Accordingly, I dissent from Part III of the majority's disposition. I would reverse Verdugo's convictions on the ground of insufficiency of the evidence.

APPENDIX B
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	Filed August 5, 1994
Plaintiff-Appellee,	)	No. 88-5462
	)	
v.	)	D.C. No. 87-422(A)-ER
	)	
RENE MARTIN VERDUGO-URQUIDEZ,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: BROWNING, D.W. NELSON, and REINHARDT, Circuit Judges

The memorandum disposition filed June 22, 1994 is amended as follows:

At page 11, line 4: replace "one of Camarena's main interrogators" with "Gomez-Espana."

A majority of the judges on the panel has voted to deny the petition for rehearing. The panel has voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE EDWARD RAFFEEDIE, JUDGE PRESIDING

No. CR 87-422 (A) -ER

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JESUS FELIX-GUTIERREZ, RAUL LOPEZ-ALVAREZ, RENE MARTIN VERDUGO-URQUIDEZ, ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, June 20, 1988

10:00 A.M.

* * * * *

[18] THE COURT: The defendant Verdugo had filed a motion to dismiss the indictment for violation of the extradition treaty. The Court has read and considered this motion very carefully, as well as the opposition which has been filed, and it is the Court's understanding of the law that there can only be one conclusion in this case, which has been dictated by higher authority, and that is that this motion must be denied for the following reasons.

First, I would like to note that the government's novel and unsupported contention that the defendant's seizure is not properly before the court is without merit. Mr. Verdugo would not have been available for trial in this case but for his seizure in Mexico. Thus the legality of his seizure is clearly at issue here.

Despite the protest filed by the Mexican government, the defendant's standing to raise an objection to a purported violation of the extradition treaty is not beyond doubt. Read literally the case of United States vs. Mann indicates that only the Mexican government has standing to raise a violation of the extradition treaty. However, the Mann case should be read in accord with the Second [19] Circuit's view that a protest by the offended government gives the individual a right to raise an alleged violation of an extradition treaty.

Our Supreme Court held in Ker vs. Illinois--and that case is right on point--that an abduction does not violate an extradition treaty.

The Second Circuit's decision in United States vs. Sobell similarly held that the abduction of a criminal defendant does not violate the extradition treaty.

Defendant's quotation of selected portions of the extradition treaty does not suggest that the Second Circuit has erred in its interpretation of the treaty. Rather, the selection quoted merely confirmed the view that the treaty deals solely with the obligation of the signatory when a

request for extradition under the treaty is made or granted.

Defendant's argument that the principle of specialty should apply in this case, since it would have applied if the defendant had in fact been extradited is meritless. As the Second Circuit pointed out in the Fiocconi case, "a defendant's right to invoke the principle of specialty is intended to preserve the United States from a breach of faith toward another country." When the United States has acted unilaterally as permitted by the extradition treaty, the concern enunciated in the Fiocconi [20] case is not applicable.

Finally, the defendant's statement that the American executive has no power to extradite except as permitted by treaty or act of Congress appears to be simply beside the point in this case.

This motion should be denied, and that would be the intention of the Court.

Do you wish to be heard?

MR. PANCER: Your Honor, the ruling and the government's papers adopt a position that the extradition treaty doesn't apply because there was no request made for extradition. I don't know that to be a fact, and I guess what I think should happen is that the government should represent that they had no talks--our government had no talks with officials of the Republic of Mexico concerning the extradition of Mr. Verdugo because based on the Court's ruling and based on the cases, a different decision may be necessary if the government did explore---

THE COURT: Why would it be different if the government had explored it?

MR. PANCER: Because their argument is that there was no extradition because we didn't attempt to extradite Mr. Verdugo. We just kidnapped him.

THE COURT: Well, disregard that. Suppose the government did try and failed, and then the man was

abducted, [21] as he was in this case. Would that change anything that I have just said regarding the Ker vs. Illinois case?

MR. PANCER: Well, our argument would be then, Your Honor, that because the law of extradition--if the government tried to avail itself of that law, that they must at least then be bound by the law as they at least first tried to use it.

THE COURT: How does that give the defendant any greater standing, which is the main flaw here, to raise an objection to purported violation of the extradition treaty?

MR. PANCER: Well, I know the Court disagrees with our position, but it is our position that that didn't apply once the government of Mexico objected.

I am not just here arguing that Rene Verdugo objects. I am here relying on the fact that the government of Mexico objects, and if we are going to be a nation of laws, the only way we can do that is for the Court to make the United States government follow those laws.

And that is why I am saying that that is our position, Your Honor, concerning standing, that the government must be forced to obey all the laws, including the extradition laws.

THE COURT: Your position is contrary to that of the Supreme Court, and I am obliged to follow their view [22] on it as I see it.

MR. PANCER: I understand, Your Honor.

THE COURT: The motion is denied.

* * * *

APPENDIX D

The Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656, provides:

EXTRADITION TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES

The Government of the United States of America and the Government of the United Mexican States:

Desiring to cooperate more closely in the fight against crime and, to this end, to mutually render better assistance in matters of extradition;

Have agreed as follows:

ARTICLE 1
Obligation to Extradite

1. The Contracting Parties agree to mutually extradite, subject to the provisions of this Treaty, persons who the competent authorities of the requesting Party have charged with an offense or have found guilty of committing an offense, or are wanted by said authorities to complete a judicially pronounced penalty of deprivation of liberty for an offense committed within the territory of the requesting Party.

2. For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

a) its laws would provide for the punishment of such an offense committed in similar circumstances, or

b) the person sought is a national of the requesting Party, and that Party has

jurisdiction under its own laws to try that person.

ARTICLE 2
Extraditable Offenses

1. Extradition shall take place, subject to this Treaty, for willful acts which fall within any of the clauses of the Appendix and are punishable in accordance with the laws of both Contracting Parties by deprivation of liberty the maximum of which shall not be less than one year.

2. If extradition is requested for the execution of a sentence, there shall be the additional requirement that the part of the sentence remaining to be served shall not be less than six months.

3. Extradition shall also be granted for willful acts which, although not being included in the Appendix, are punishable, in accordance with the federal laws of both Contracting Parties, by a deprivation of liberty the maximum of which shall not be less than one year.

4. Subject to the conditions established in paragraphs 1, 2 and 3, extradition shall also be granted:

a) For the attempt to commit an offense; conspiracy to commit an offense; or the participation in the execution of an offense; or

b) When, for the purpose of granting jurisdiction to the United States government, transportation of persons or property, the use of the mail or other means of carrying out interstate or foreign commerce, is also an element of the offense.

ARTICLE 3
Evidence Required

Extradition shall be granted only if the evidence be

found sufficient, according to the laws of the requested Party, either to justify the committal for trial of the person sought if the offense of which he has been accused had been committed in that place or to prove that he is the person convicted by the courts of the requesting Party.

ARTICLE 4

Territorial Application

1. For the purposes of this Treaty, the territory of a Contracting Party shall include all the territory under the jurisdiction of that contracting Party, including airspace and territorial waters and vessels and aircraft registered in that Contracting Party if any such aircraft is in flight when the offense is committed.

2. For the purposes of this Treaty, an aircraft shall be considered to be in flight at any time from the moment when all its external doors are closed following the embarkation until the moment when any such door is opened for disembarkation.

ARTICLE 5

Political and Military Offenses

1. Extradition shall not be granted when the offense for which is it requested is political or of a political character.

If any question arises as to the application of the foregoing paragraph, the Executive authority of the requested Party shall decide.

2. For the purpose of this Treaty, the following offenses shall not be considered to be offenses included in paragraph 1:

a) The murder or other willful crime against the life or physical integrity of a Head of State or Head of Government or of his

family, including attempts to commit such an offense.

b) An offense which the Contracting Parties may have the obligation to prosecute by reason of a multilateral international agreement.

3. Extradition shall not be granted when the offense for which extradition is requested is a purely military offense.

ARTICLE 6

Non bis in idem

Extradition shall not be granted when the person sought has been prosecuted or has been tried and convicted or acquitted by the requested Party for the offense for which extradition is requested.

ARTICLE 7

Lapse of Time

Extradition shall not be granted when the prosecution or the enforcement of the penalty for the offense for which extradition has been sought has become barred by lapse of time according to the laws of the requesting or requested Party.

ARTICLE 8

Capital Punishment

When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE 9

Extradition of Nationals

1. Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

ARTICLE 10

Extradition Procedures and Required Documents

1. The request for extradition shall be made through the diplomatic channel.

2. The request for extradition shall contain the description of the offense for which extradition is required and shall be accompanied by:

a) A statement of the facts of the case;
b) The text of the legal provisions describing the essential elements of the offense;
c) The text of the legal provisions describing the punishment for the offense;
d) The text of the legal provisions relating to the time limit on the prosecution or the execution of the punishment of the offense;
d) The facts and personal information of the person sought which will permit his identification and, where possible, information concerning his location.

3. In addition, when the request for extradition relates to a person who has not yet been convicted, it shall be accompanied by:

a) A certified copy of the warrant of arrest issued by a judge or other judicial officer of the requesting Party;

b) Evidence which, in accordance with the laws of the requested Party, would justify the apprehension and commitment for trial of the person sought if the offense had been committed there.

4. When the request for extradition relates to a convicted person, it shall be accompanied by a certified copy of the judgment of conviction imposed by a court of the requesting Party.

If the person was found guilty but not sentenced, the extradition request shall be accompanied by a certification to that effect and a certified copy of the warrant of arrest.

If such person has already been sentenced, the request for extradition shall be accompanied by a certification of the sentence imposed and a statement indicating which part of the sentence has not been carried out.

5. All the documents that must be presented by the requesting Party in accordance with the provisions of this Treaty shall be accompanied by a translation in the language of the requested Party.

6. The documents which, according to this Article, shall accompany the request for extradition, shall be received in evidence when:

a) In the case of a request emanating from the United States, they are authenticated by the official seal of the Department of State and legalized by the manner prescribed by the Mexican law;

b) In the case of a request emanating from the United Mexican States, they are certified by

the principle diplomatic or consular officer of the United States in Mexico.

ARTICLE 11

Provisional Arrest

1. In the case of urgency, either Contracting Party may request, through the diplomatic channel, the provisional arrest of an accused or convicted person. The application shall contain a description of the offense for which the extradition is requested, a description of the person sought and his whereabouts, an undertaking to formalize the request for extradition, and a declaration of the existence of a warrant of arrest issued by a competent judicial authority or a judgment of conviction issued against the person sought.

2. On receipt of such a request, the requested Party shall take the necessary steps to secure the arrest of the person claimed.

3. Provisional arrest shall be terminated if, within a period of 60 days after the apprehension of the person claimed, the executive authority of the requested Party has not received the formal request for extradition and the documents mentioned in Article 10.

4. The fact that the provisional arrest is terminated pursuant to paragraph 3 shall not prejudice the extradition of the person sought if the request for extradition and the necessary documents mentioned in Article 10 are delivered at a later date.

ARTICLE 12

Additional Evidence

If the Executive authority of the requested Party considers that the evidence furnished in support of the request for extradition is not sufficient in order to fulfill the requirements of this Treaty, that Party shall request the

presentation of the necessary additional evidence.

ARTICLE 13

Procedure

1. The request for extradition shall be processed in accordance with the legislation of the requested Party.

2. The requested Party shall make all arrangements necessary for internal procedures arising out of the request for extradition.

3. The competent legal authorities of the requested Party shall be authorized to employ all legal means within their power to obtain from the judicial authorities the decisions necessary for the resolution of the request for extradition.

ARTICLE 14

Decision and Surrender

1. The requested Party shall promptly communicate to the requesting Party its decision on the request for extradition.

2. In the case of complete or partial rejection of a request for extradition, the requested Party shall give the reasons on which it was based.

3. If the extradition is granted, the surrender of the person sought shall take place within such time as may be prescribed by the laws of the requested Party. The competent authorities of the Contracting Parties shall agree on the date and place of the surrender of the person sought.

4. If the competent authority has issued the warrant or order for the extradition of the person sought and he is not removed from the territory of the requested Party within the prescribed period, he shall be set at liberty and the requested Party may subsequently refuse to extradite him for the same offense.

ARTICLE 15

Delayed Surrender

The requested Party, after granting the extradition, may defer the surrender of the person sought when that person is being proceeded against or is serving a sentence in the territory of the requested Party for a different offense, until the conclusion of the proceeding or the full execution of the punishment that has been imposed.

ARTICLE 17

Rule of Specialty

1. A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

a) He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

b) He has not left the territory of the requesting Party within 60 days after being free to do so; or

c) The requested Party has given its consent to his detention, trial, punishment or extradition to a third State for an offense other than that for which the extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

2. If, in the course of the procedure, the classification of the offense is changed for which the person requested was extradited, he shall be tried and sentenced on the condition that the offense, in its new legal form:

a) Is based on the same group of facts

established in the request for extradition and in the documents presented in its support; and

b) Is punishable with the same maximum sentence as the crime for which he was extradited or with a lesser sentence.

ARTICLE 18

Summary Extradition

If the person sought informs the competent authorities of the requested Party that he agrees to be extradited, that Party may grant his extradition without further proceedings, and shall take all measures permitted under its laws to expedite the extradition. In such cases Article 17 shall not be applicable.

ARTICLE 19

Surrender of Property

1. To the extent permitted under the law of the requested Party and subject to the rights of third parties, which shall be duly respected, all articles, instruments, objects of value or documents relating to the offense, whether or not used for its execution, or which in any other manner may be material evidence for the prosecution, shall be surrendered upon the granting of the extradition even when extradition cannot be effected due to the death, disappearance, or escape of the accused.

2. The requested Party may condition the surrender of articles upon a satisfactory assurance from the requesting Party that the articles will be returned to the requested Party as soon as possible.

ARTICLE 20

Transit

1. The right to transport through the territory of

one of the Contracting Parties a person who is not a national of that Contracting Party surrendered to the other Contracting Party by at third State shall be granted on presentation made through the diplomatic channel of a certified copy of the decision on extradition, provided that reasons of public order are not opposed to the transit.

2. The authorities of the transit State shall be in charge of the custody of the extradited person while that person is in its territory.

3. The Party to which the person has been extradited shall reimburse the State through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

ARTICLE 21

Expenses

The requested Party shall bear the expenses of the arrangements referred to in Article 13, with the exception that the expenses incurred for the translation of documents and, if applicable, for the transportation of the person ordered extradited shall be paid by the requesting Party.

ARTICLE 22

Scope of Application

1. This Treaty shall apply to offenses specified in Article 2 committed before and after this Treaty enters into force.

2. Requests for extradition that are under process on the date of the entry into force of this Treaty, shall be resolved in accordance with the provisions of the Treaty of 22 February, 1899, [[1]] and the Additional Conventions on

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[1] TS 242; 31 Stat. 1818.

Extradition of 25 June 1902, [2] 23 December 1925, [3] and 16 August 1939. [4]

ARTICLE 23

Ratification, Entry into Force, Denunciation

1. This Treaty shall be subject to ratification; the exchange of instruments of ratification shall take place in Washington as soon as possible.

2. This Treaty shall enter into force on the date of exchange of the instruments of ratification.

3. On entry into force of this Treaty, the Treaty of Extradition of 22 February 1899 and the Additional Conventions on Extradition of 25 June 1902, 23 December 1925 and 16 August 1939 between the United States of America and the United Mexican States, shall cease to have effect without prejudice to the provisions of Article 22.

4. Either Contracting Party may terminate this Treaty by giving notice to the other Party. The termination shall take effect six months after the receipt of such notice.

Done in two originals, in the English and Spanish languages, both equally authentic, at Mexico City this fourth day of May, one thousand nine hundred seventy-eight.

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[2] TS 421; 9 Bevrans 918.

[3] TS 741; 44 Stat. 2409.

[4] TS 967; 55 Stat. 1183.

/S/ Cyrus Vance [1]
For the Government of the
United States of America

/S/ S. Roel [2]
For the Government of the
United Mexican States

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[1] Cyrus Vance.

[2] S. Roel.

APPENDIX

1. Murder or manslaughter; abortion.

2. Malicious wounding or injury.

3. Abandonment of minors or other dependents when there is danger of injury or death.

4. Kidnapping; child stealing; abduction; false imprisonment.

5. Rape; statutory rape; indecent assault; corruption of minors, including unlawful sexual acts with or upon children under the age of consent.

6. Procuration; promoting or facilitating prostitution.

7. Robbery; burglary; larceny.

8. Fraud.

9. Embezzlement.

10. An offense against the laws relating to counterfeiting and forgery.

11. Extortion.

12. Receiving or transporting any money, valuable securities, or other property knowing the same to have been unlawfully obtained.

13. Arson; malicious injury to property.

14. Offenses against the laws relating to the traffic in, possession, production, manufacture, importation or exportation of dangerous drugs and chemicals, including narcotic drugs, cannabis, psychotropic drugs, opium, cocaine, or their derivatives.

15. Offenses against the laws relating to the control of poisonous chemicals or substances injurious to health.

16. Piracy.

17. Offenses against the safety or means of transportation including any act that would endanger a person in a means of transportation.

18. An offense relating to unlawful seizure or exercise of control of trains, aircraft, vessels, or other means of transportation.

19. Offenses against the laws relating to prohibited weapons, and the control of firearms, ammunition, explosives, incendiary devices or nuclear materials.

20. An offense against the laws relating to international trade and transfers of funds or valuable metals.

21. An offense against the laws relating to the importation, exportation, or international transit of goods, articles, or merchandise, including historical or archaeological items.

22. Violations of the customs laws.

23. Offenses against the laws relating to the control of companies, banking institutions, or other corporations.

24. Offenses against the laws relating to the sale of securities, including stocks, bonds and instruments of credit.

25. Offenses against the laws relating to bankruptcy or rehabilitation of a corporation.

26. Offenses against the laws relating to prohibition of monopoly or unfair transactions.

27. Offenses against the laws relating to protection of industrial property or copyright.

28. Offenses against the laws relating to abuse of official authority.

29. Bribery, including soliciting, offering and accepting bribes.

30. Perjury; false statements to any governmental authority. Subornation of perjury or false statements.

31. Offenses against the laws relating to obstruction of justice, including harboring criminals and suppressing evidence.